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3 UNITED STATES DISTRICT COURT  
4 EASTERN DISTRICT OF WASHINGTON  
5

6 UNITED STATES OF AMERICA,

7 Plaintiff,

8 vs.

9 KEVIN WILLIAM HARPHAM,

10 Defendant.  
11

)  
) No. CR-11-042-JLQ

) MEMORANDUM OPINION and  
) ORDER Re: PLEA AGREEMENT  
)  
)  
)

12 On September 7, 2011, the Defendant appeared in open court with counsel and  
13 entered Pleas of Guilty to two counts of the Superseding Indictment, subject to his right  
14 to withdraw the pleas if the court rejected the Plea Agreement. The two counts to which  
15 the Defendant pled guilty were Count 1 and Count 3.

16 Count 1 charged Attempted Use of a Weapon of Mass Destruction carrying a  
17 maximum possible penalty of life in prison and, if a sentence of less than life, supervised  
18 release for life. Count 3 charged the Defendant with Attempt To Cause Bodily Injury  
19 With An Explosive Device Because of Actual or Perceived Race, Color, or National  
20 Origin of a person. The maximum possible sentence for such an offense is incarceration  
21 for a period of ten years and not more than three years of supervised release.

22 In the Plea Agreement the Government has agreed that if the Plea Agreement is  
23 accepted by the court, the Government will dismiss Count 2 and Count 4 with prejudice.  
24 Count 2 charged the Defendant with Possession of an Unregistered Destructive Device  
25 which carried maximum possible incarceration of ten years. Count 4 charged Use of a  
26 Firearm (a destructive device) in Relation To a Crime of Violence. Count 4 carried  
27 maximum possible incarceration of life imprisonment. Of greater import is the fact that

1 the statutes applicable to Count 4 provide that a person convicted of a Count 4 offense  
2 with a destructive device is to be sentenced to not less than 30 years incarceration and  
3 such term is to be imposed consecutive to any other term of imprisonment on other  
4 Counts. The sentences which must be imposed upon conviction of commission of the  
5 offense alleged in Count 4 are the most serious of the four counts and the agreement by  
6 the Government to dismiss Count 4 appears to the court to carry the most benefit to the  
7 Defendant.

8 The Plea Agreement proffered to the court for its decision also provided for waiver  
9 of the Defendant's right to appeal any of the court's pretrial rulings, his conviction, and  
10 the sentence imposed, provided that the total sentence is not more than 32 years of  
11 incarceration. The Government reserved the right to withdraw from the Plea Agreement  
12 if the court rejected the Plea Agreement or if the court proposed to impose total  
13 incarceration sentences of less than 27 years. The waiver of appeal provision in the Plea  
14 Agreement plays an important role in bringing closure to this matter.

15 Upon entry of the two pleas of guilty, the court, on September 8, 2011, entered its  
16 Order directing the parties to submit, not later than November 1, 2011, all materials in  
17 support of their arguments as to why the court should accept the Plea Agreement. (ECF  
18 No. 203). Nothing was promptly filed in response to this Order and the court, on or  
19 about October 24, 2011, caused its staff to notify counsel that the court wished to have  
20 prompt compliance with its September 8, 2011 Order. On November 1, 2011, the parties  
21 filed their Request of the Parties for the Court to Accept the Plea Agreement (ECF No.  
22 213), which is now before the court.

23 Because of the court's concern over the adequacy in the declaration of persuasive  
24 reasons for the court to accept the Plea Agreement, the court conducted a telephone  
25 conference with counsel on November 7, 2011 wherein the court expressed its concerns  
26 over the lack of specificity or discussion of the strengths and/or weaknesses of each side  
27 in the matter. The court advised counsel that it appeared that the pleading of the parties

1 was mostly a discussion of the advisory and non-binding Sentencing Guidelines. The  
2 discussion of those Guidelines in the submittal reflected the fact that the bare Guideline  
3 calculations, without enhancements or departures, resulted in a Guideline range of less  
4 than the Plea Agreement sentencing range of 27 to 32 years. While that fact is of import  
5 to the court in determining whether the Plea Agreement should be accepted, that matter  
6 alone does not control the court's decision.

7 Federal Rule of Criminal Procedure 11(c)(1)(C) provides in part that the attorneys  
8 for the Government and the Defendant may enter into a Plea Agreement that contains a  
9 provision for a specific term of incarceration or a range of proposed incarceration as in  
10 the matter *sub judice*. Included within that Rule is a recognition that such a Plea  
11 Agreement may include a provision for dismissal of charges. Such dismissals in Plea  
12 Agreements are commonly referred to as "charge bargains." The Government's  
13 agreement in this case to dismiss Counts 2 and 4 are "charge bargains." Since whether  
14 or not to include any specific charge against an individual defendant is a matter within  
15 the sole discretion of the executive branch of government, in this case the Department  
16 of Justice and the United States Attorney for the Eastern District of Washington, the  
17 court's review of agreements to dismiss charges is ordinarily limited to a determination  
18 as to whether such action is "clearly contrary to manifest public interest." *United States*  
19 *v. Miller*, 722 F. 2d 562, 565-66 (9th Cir. 1983).

20 Agreements to a specific sentence or, as in this case a sentencing range, are  
21 commonly referred to as "sentence bargains." Review of plea agreements with "sentence  
22 bargains" is vested in the broad discretion of the district court. Fed.R.Crim P.  
23 11(c)(3)(A). Since the Plea Agreement in the instant matter is a combination of both a  
24 "sentence (range) bargain" and a "charge bargain" with the dismissal of two Counts,  
25 including Count 4 which carries the most extensive incarceration penalties, the court  
26 will review the Plea Agreement as a whole, utilizing the broad discretionary standard.

27 While Rule 11(c) clearly leaves the decision of acceptance or rejection of the Plea

1 Agreement to the broad discretion of the court, that Rule does not set forth standards or  
2 criteria for the court to utilize in making its decision. (See the Advisory Committee  
3 Notes to Rule 11). However, as with all discretionary determinations, the acceptance or  
4 rejection of a Plea Agreement may not be based upon arbitrary or capricious reasons.  
5 The discretion of the court must be, in fact and in law, exercised. *See United States v.*  
6 *Morgan*, 506 F. 3d 705, 710 (9<sup>th</sup> Cir. 2007). While the November 1, 2011 submittal of  
7 the parties in support of acceptance of the Plea Agreement is of limited assistance to the  
8 court, the court has now had the benefit of the preliminary Presentence Report (ECF No.  
9 214) which is much more comprehensive and factual than the limited submittal by the  
10 parties. However, the Presentence Report and the Probation Office preparing it have  
11 been limited by the fact that, upon the advice of his attorneys, the Defendant refused to  
12 be interviewed by the Probation Officer. There was a rational basis for that decision prior  
13 to the determination by the court as to whether it would accept the Plea Agreement since  
14 if the Plea Agreement was rejected and a jury trial ensued, any inculpatory admissions  
15 by the Defendant to the Probation Officer could be offered by the Government at trial.  
16 Upon acceptance of the Plea Agreement, such rationale would no longer exist.

17 In evaluating the request for acceptance of the Plea Agreement, this court has had  
18 the benefit of presiding over all matters concerning the case, including evidentiary  
19 hearings and rulings on extensive pretrial motions, including motions to suppress  
20 physical and oral evidence, and a motion to dismiss based upon clear violations of  
21 Fed.R.Crim.P. 4(c)(3) and the Defendant's Fifth and Sixth Amendment rights at the time  
22 of his arrest. The court has suppressed any statements of the Defendant made during  
23 those violations of the Rules and the Government has wisely conceded that motion, thus  
24 avoiding any possible reversal of convictions on those grounds except for an argument  
25 that the Government's misconduct was so offensive as to warrant dismissal of all  
26 charges, a claim that this court has denied and one that does not appear to have a  
27 likelihood of acceptance on appeal.

1 In making its decision in this matter, it is obvious to the court that the true benefit  
2 to the Defendant is the removal of a possible life sentence. Such a sentence would be  
3 considered by any court in view of the egregious nature of the actions of the Defendant,  
4 actions which could have led to death and massive injuries to a large number of innocent  
5 persons and actions with no rational reason –actions that shock the conscience of the  
6 court. In making the Plea Agreement decision, the court has also considered the various  
7 factors set forth in 18 U.S.C. § 3553(a).

8 In its submittal the Government has referred to the large cost of presenting this  
9 matter in a lengthy jury trial. While that matter is ordinarily one that plays an important  
10 role in determining the acceptability of plea agreements, in this instance, the nature and  
11 extent of the alleged conduct of the Defendant far outweigh any cost consideration  
12 involved in a jury trial. The Government further states that acceptance of the Plea  
13 Agreement will bring finality to the matter and avoid possible Not Guilty verdicts or  
14 reversal on appeal. Like all criminal cases, such are matters which favor resolution of  
15 criminal cases without trial, assuming the end result is an appropriate one.

16 At the heart of the Plea Agreement is a capping of any sentence to be imposed at  
17 32 years imprisonment rather than the maximum statutorily authorized sentence of life  
18 imprisonment. The Defendant is now 37 years of age. Assuming, without deciding, a  
19 maximum 32 year sentence with credit for time served and with an earned 15% “good-  
20 time” credit would mean the Defendant would be released in his mid 60s, to many still  
21 a relatively young age. However, this is a substantial punishment and incarceration will  
22 prevent, and hopefully deter, the Defendant and others from similar actions in the future.

23 The court can only conclude at this stage of the case that but for the alertness and  
24 vigilance of two young Spokane men resulting in the discovery of the explosive device,  
25 and prompt and efficient actions by members of the Spokane Police Department, the  
26 Defendant would have detonated the device with resultant death and injury to many  
27 participants in the Martin Luther King, Jr. Day observance. The court is certain that if

1 that grievous event had occurred, all would be preparing for and participating in a capital  
2 punishment trial of the Defendant.

3 This case has been prosecuted and defended by able and experienced counsel on  
4 both sides and their judgment is credited by the court. The court is likewise experienced  
5 in determining the acceptability of now very common Rule 11(c)(1)(C) plea agreements,  
6 both in this district and elsewhere in the United States. While this is a case that would  
7 factually and legally support the imposition of a life sentence and which, had the court  
8 been making the initial decision as to whether to offer such a Plea Agreement, would  
9 probably not have, there are rational reasons for the course of action taken by the  
10 Government and the Defendant, guided by able counsel, in the Plea Agreement.  
11 Therefore, the court has determined to exercise its discretion and accept the Plea  
12 Agreement. The court will make a determination at the sentencing hearing on November  
13 30, 2011, as to where in the range of 27-32 years the sentence of incarceration should lay  
14 to be followed by placing the Defendant on supervised release under strict conditions for  
15 the rest of his natural life.

16 Having removed the apparent principal reason for the Defendant to refuse an  
17 interview by the United States Probation Officer, the court suggests that that decision  
18 now be reviewed by the defense.

19 With acceptance of the plea agreement, the court proposes to order that all  
20 pleadings in this matter previously filed under seal be unsealed -- with the exception of  
21 grand jury materials. Counsel shall advise the court on or before **November 16, 2011**,  
22 as to any objections to the entry of such an Order.

23 The Clerk shall enter this Order and furnish copies to counsel.

24 Dated November 9, 2011.

25 s/ Justin L. Quackenbush  
26 JUSTIN L. QUACKENBUSH  
27 SENIOR UNITED STATES DISTRICT JUDGE  
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